

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

DARLENE HENCHEN, Individually and as  
Administratrix of the Estate of  
ROBERT HENCHEN, Deceased,  
Plaintiff

Vs.

**Civil Action No.**  
**08-CV-0529S**

**APPLICATION**  
**TO SETTLE**  
**CLAIM**

THE COUNTY OF ERIE, NEW YORK,  
SHERIFF TIMOTHY HOWARD,  
Individually and in his official  
capacity as Sheriff of Erie County,  
DONALD LIVINGSTON,  
Individually and in his official  
capacity as Superintendent of the  
Erie County Holding Center,  
BRIAN JOSEPH, M.D.,  
The Erie County Holding Center and  
NIKKI FERA, R.N.  
The Erie County Holding Center,  
Defendants

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DARLENE HENCHEN, the Petitioner herein, being duly sworn, alleges  
as follows:

1. The Decedent died a resident of Erie County, New York on May 19,  
2007. Prior to his death Robert Hennen resided in Erie County with Petitioner.
2. Petitioner was granted Limited Letters of Administration by the Erie

County Surrogate's Court on July 31, 2007 under Surrogate's Court File No. 2007-2920. Such letters are unrevoked and in full force at this time.

3. At the time of his death Robert Henchen was an inmate at the Erie County Holding Center in Buffalo, New York. On May 15, 2007 Robert Henchen was transported from the Erie County Holding Center to the Erie County Medical Center where he died on May 19, 2007.

4. An autopsy performed by Sung-ook Baik, M.D. indicated the cause of death as bronchopneumonia due to starvation and dehydration with electrolyte imbalance. As a result of Robert Henchen's death, a lawsuit was instituted against Erie County, the Erie County Holding Center and several employees of the Holding Center.

5. Petitioner, as Administrator, retained the services of John J. Molloy, Esq. to prosecute a claim and cause of action for the events causing the death of Robert Henchen. Pursuant to an agreement, Mr. Molloy is to receive Thirty-Three and One Third Percent ( $33\frac{1}{3}\%$ ) of all sums received in settlement of any cause of action and to be reimbursed for all disbursements incurred during the course of the litigation.

6. Petitioner has been informed that a settlement in the amount of Forty-

Nine Thousand Nine Hundred Ninety-Five Dollars (\$49,995.00) has been proposed. Petitioner believes this amount is fair and in the best interests of the Estate of Robert Henchen.

7. Decedent at the time of his death was married to Petitioner and left no children surviving.

8. Petitioner has been advised that the settlement of the lawsuit is for the conscious pain and suffering of decedent with no provision being made for the wrongful death of Robert Henchen.

9. At the time of Robert Henchen's death he was under indictment for two counts of homicide. Petitioner is aware that a defense of mental disease or defect was contemplated in the criminal actions. Petitioner was informed that such a defense, if successful, would have lead to Robert Henchen's commitment to a mental institution for a considerable amount of time. Petitioner was also aware that an unsuccessful defense would result in two life sentences.

Accordingly, Robert Henchen's earning prospects limited.

10. Petitioner was informed by John J. Molloy, Esq., that medical personnel would testify at trial that death by starvation and dehydration is a painful process.

11. Petitioner has been advised that the proceeds for conscious pain and

suffering will be paid to the Estate of Robert Henchen. Petitioner is aware that she is sole beneficiary of Robert Henchen's estate.

12. Petitioner requests that this Court approve a legal fee of Sixteen Thousand Four Hundred Five Dollars (\$16,405.00) and disbursements of Seven Hundred Seventy-Seven Dollars and Eighteen Cents (\$777.18) be paid to John J. Molloy, Esq. with the balance of Thirty-Two Thousand Eight Hundred Twelve Dollars and Eighty-Two Cents (\$32,812.82) being paid to the Estate.

13. No previous application has been made for the relief herein.

WHEREFORE, Petitioner respectfully requests this Court grant the following relief: (1) that the Administrator of the Estate of Robert Henchen be authorized to sign any and all documents needed to effectuate the settlement of the claims against Erie County; (2) that the settlement proceeds relate solely to the conscious pain and suffering of Robert Henchen; (3) that the sum of \$17,182.18 be authorized to be paid to John J. Molloy as legal fee and disbursement; and (4) other and further relief as to this Court may seem just and proper.


DATED: September 8, 2009

  
\_\_\_\_\_  
Darlene Hennen

STATE OF NEW YORK)  
COUNTY OF ERIE )ss:

On the 8 day of September in the year 2009, before me the undersigned, personally appeared DARLENE HENCHEN, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Instrument and acknowledged to me that she executed the same in her capacity and that by her signature on the Instrument, the individual or the person on behalf of which the individual acted, executed the Instrument.

KATIE A. NEWTON  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires 7.25.10

  
\_\_\_\_\_  
Notary Public

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

DARLENE HENCHEN, Individually and as  
Administratrix of the Estate of  
ROBERT HENCHEN, Deceased,  
Plaintiff

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vs.

THE COUNTY OF ERIE, NEW YORK,  
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The Erie County Holding Center and  
NIKKI FERA, R.N.  
The Erie County Holding Center,  
Defendants

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**PETITION TO COMPROMISE, SETTLE AND  
DISTRIBUTE ESTATE.**

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Attorney for Petitioner:

JOHN J. MOLLOY, ESQ.  
4268 Seneca Street  
West Seneca, NY 14224  
(716) 675-5050

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

DARLENE HENCHEN, Individually and as  
Administratrix of the Estate of  
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Plaintiff

vs.

Civil Action No.  
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ATTORNEY'S  
AFFIDAVIT

THE COUNTY OF ERIE, NEW YORK,  
SHERIFF TIMOTHY HOWARD,  
Individually and in his official  
capacity as Sheriff of Erie County,  
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The Erie County Holding Center and  
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The Erie County Holding Center  
Defendants

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STATE OF NEW YORK )  
COUNTY OF ERIE )ss:

John J. Molloy being duly sworn, deposes and says:

1. I am the attorney representing the Estate of Robert Hennen in the

above entitled action. I am fully familiar with the facts circumstances underlying this matter.

2. I submit this affidavit in support of a Petition by Darlene Henchen for an Order of this Court approving a proposed settlement of the above captioned action; directing the distribution of the net proceeds of the proposed settlement; and, fixing the reasonable expenses, including attorney fees and disbursements, accrued in representing this matter.

3. On May 19, 2007 Robert Henchen passed away in Erie County Medical Center. Mr. Henchen was admitted to the hospital on May 15, 2007 from the Erie County Holding Center where he had been held since January, 2007.

4. It was determined that Mr. Henchen died of bronchopneumonia due to starvation and dehydration.

5. An investigation was conducted into the circumstances leading to Mr. Henchen's admission to the Erie County Medical Center. It was determined through witness interviews, review of Holding Center Records and Mr. Henchen's medical records that Erie County, Erie County Holding Center and various Holding Center employees were liable in Mr. Henchen's death.

6. A Notice of Claim was filed against Erie County on August 13, 2007.



Suit was commenced in the Western District of New York Federal Court, on July 18, 2008.

7. On or about January 22, 2009 a settlement offer in the amount of Forty-Nine Thousand Nine Hundred Ninety-Five Dollars (\$49,995.00) was made by the defendant, Erie County. Affiant believes this amount is fair and in the best interests of the Estate of Robert Henchen.

8. At the time of Mr. Henchen's death he was an inmate at the Erie County Holding Center having been charged with numerous crimes, including two counts of murder. Affiant represented Mr. Henchen on the criminal matter. It was believed that after numerous mental examinations and a review of Mr. Henchen's history that he may not have been criminally responsible for any of his actions. Affiant submitted a Notice of Defense Based on Mental Disease or Defect with the court.

9. If Affiant's defense was successful, Mr. Henchen would spend a considerable amount of time in a mental institution. If Mr. Henchen was convicted, he was facing at least two life sentences. In any event, Mr. Henchen's future earning capacity was bleak.

10. Affiant in investigating the claim against Erie County has been informed that death by starvation and dehydration is a rather painful process.

11. Although a claim against Erie County and the other defendants was for wrongful death and conscious pain and suffering, the proof of pecuniary loss would have been difficult, if not impossible, to sustain. It is requested that this Court find that all proceeds of the settlement be for conscious pain and suffering.

12. On July 31, 2007 Petitioner, Darlene Hennen, widow of Robert Hennen was granted Letters of Limited Administration by this Court.

13. Affiant has contracted with Petitioner to receive a fee of Thirty-Three and One-Third Percent ( $33\frac{1}{3}\%$ ) off any and all sums recovered, after deduction of disbursements paid by Affiant.

14. Disbursements of Affiant: include Surrogate Court filing fee (\$350), medical records (\$203.42), examination of medical records by Nurse Consultant (\$200), Certified Mail expenses \$23.76) totaling \$ 777.18.

Legal fee: \$ 16,405.00

Balance to Estate: \$ 32,812.82

15. No previous application has been made for the relief herein.

WHEREFORE, Affiant respectfully requests this Court grant the relief

requested in the annexed Petition, together with such other and further relief as to this Court may seem just and proper.

/s/ John J. Molloy  
John J. Molloy, Esq.  
Attorney for Plaintiff  
4268 Seneca Street  
West Seneca, NY 14224  
(716) 675-5050  
[jmolloy@johnmolloylaw.com](mailto:jmolloy@johnmolloylaw.com)

Sworn to before me this  
10<sup>th</sup> day of September, 2009.

/s/ Judy A. Mallery  
Notary Public  
[jmallery@johnmolloylaw.com](mailto:jmallery@johnmolloylaw.com)

**EXHIBIT 1**

ERIE COUNTY MEDICAL EXAMINER'S OFFICE

462 Grider Street  
Buffalo, New York 14215  
716-961-7591  
fax 716-961-7581

PATHOLOGICAL EXAMINATION

HENCHEN, Robert  
Case # ME 1023-07

*Male—Caucasian— 42 Years*

An autopsy was performed on the body of Robert Hennen at the Office of the Medical Examiner on the 21<sup>st</sup> day of May 2007 by Dr. Sung-ook Baik, Associate Chief Medical Examiner. Officers from Erie County Sheriff's Department were present at the time of autopsy.

EXTERNAL EXAMINATION:

The body is that of a well-developed, well-nourished, known as 42-year-old Caucasian male measuring 74 inches in length and weighing 209 pounds. Rigor mortis and lividity are well-developed in the back of the neck, trunk, the upper and lower extremities. The head is normocephalic. The scalp is covered by a large amount of medium length brown hair intermixed with a few white. The anterior hairline is unremarkable. The pupils of the brown eyes are central, equal, circular and each measures 0.2 cm in diameter. The sclera is white and the conjunctiva congested. The external nares and both nostrils are unremarkable. The skin of the earlobes, face and lips is pale. The oral cavity contains an endotracheal tube. The upper and lower jaws show natural teeth. There is a large amount of poorly trimmed mustache and beard present. The neck is short and thin. The right side of the neck shows hospital IV puncture mark. The chest is symmetrical. The abdomen is soft and flat. The pubic hair is well-distributed and is that of the adult male type. The penis is circumcised. There is a urinary catheter. Both testicles are present in the scrotum. The upper extremities are symmetrical. Both bilateral forearms show hospital IV puncture marks. Both hands are swollen and the back of the right hand shows a few tiny rashes. The nail beds are cyanotic. The lower extremities are symmetrical. Both legs and knees show a small bruise.

INTERNAL EXAMINATION:

The body is opened by the usual Y-shaped incision. The great vessels of the thorax and abdomen are identified and they are unremarkable. Both pleural cavities and pericardial sac are unremarkable. The abdominal cavity is not unusual.

HENCHEN, Robert  
Case # ME 1023-07  
Page Two

CARDIOVASCULAR SYSTEM:

The heart weighs 500 grams. There is a large amount of pericardial adipose tissue. On opening the heart, both sides of the heart are dilated. The valve leaflets are unremarkable. The left ventricular myocardium measures 1.5 cm in thickness. The right ventricular myocardium measures 0.5 cm in thickness. On sectioning, the cut surfaces are brown, smooth and the consistency is flabby. The coronary arteries are fully patent. The aorta shows a slight degree of atherosclerotic plaque.

RESPIRATORY SYSTEM:

The right lung weighs 1400 grams; the left lung weighs 1200 grams. On sectioning, the cut surfaces are smooth, congested and exude a large amount of foamy fluid. The consistency is markedly increased. The mucosa of the bronchi, bronchioles and trachea is smooth, congested and is covered by mucoid material. The pulmonary arteries are patent.

GASTROINTESTINAL TRACT:

The esophagus is intact. The mucosa of the stomach is congested. The small and large intestines are unremarkable.

LIVER:

The liver weighs 2200 grams. The external surface is brown, smooth and shiny. The anterior margin is sharp. On sectioning, the cut surfaces are brown, smooth and the consistency is flabby. The gallbladder contains a small amount of bile.

SPLEEN:

The spleen weighs 450 grams. The external surface and cut surfaces are unremarkable.

PANCREAS:

The organ is not unusual.

GENITOURINARY SYSTEM:

The right kidney weighs 225 grams; the left kidney weighs 210 grams. They are covered by thin fibrous capsules, which are stripped away easily leaving a brown, smooth, congested cortical surface. On sectioning, the cut surfaces are brown and smooth. The ureters, urinary bladder and prostate are unremarkable.

HENCHEN, Robert  
Case # ME 1023-07  
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NECK ORGANS:

The larynx, pharynx, hyoid bone and the neck muscles are not unusual.

ENDOCRINE SYSTEM:

The adrenal glands, pituitary gland and thyroid are unremarkable.

MUSCULOSKELETAL SYSTEM:

There is no abnormality.

HEAD:

The scalp is reflected and is natural. The skull is intact. On opening the skull, there is no evidence of a fracture or hemorrhage in the cranial cavity. The brain weighs 1700 grams. The cerebral hemispheres are symmetrical. The cerebral arteries are unremarkable. There is a prominent pressure cone on the cerebellum. The brain is extremely swollen. On sectioning, the cut surfaces are smooth, congested and show relatively well-defined corticomedullary junctions. The lateral ventricles contain a small amount of clear cerebrospinal fluid. On sectioning of the pons, medulla, cerebellum and upper one-third of the spinal cord, they are unremarkable.

MICROSCOPIC AND GROSS DIAGNOSES:

1. Bronchopneumonia.
2. Pulmonary Edema.
3. Cerebral Hypoxia.
4. Cerebral Edema.
5. Hypertrophy of the right and left ventricular myocardium.
6. Tubular nephrosis (renal failure).

CAUSE OF DEATH:

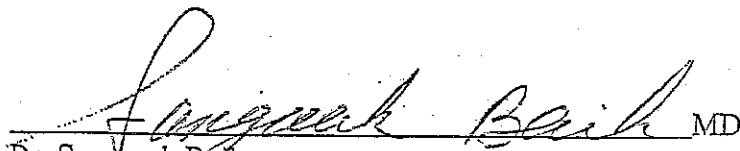
- I. Bronchopneumonia due to starvation and dehydration with electrolyte imbalance.
- II. Renal Failure.

TOXICOLOGY:

Blood, urine.

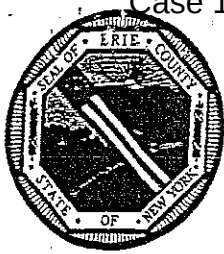
HENCHEN, Robert  
Case # ME 1023-07  
Page Four

OPINION: This 42-year-old Caucasian male, Robert Hennen, died of Bronchopneumonia due to Starvation and Dehydration with Electrolyte Imbalance. The contributory factor of death was Renal Failure. He had been on a hunger strike while he was in the Erie County Holding Center. Haloperidol was present in his body system. The manner of death was classified as Natural.

  
Dr. Sung-ook Baik MD  
Associate Chief Medical Examiner

SB:dt  
D:5/21/07  
T:5/24/07





Forensic Toxicology Laboratory  
Erie County Medical Examiners Office  
Erie County Department Of Health  
462 Grider Street, Buffalo, NY 14215  
716-961-7591

## Forensic Toxicology Report

Decedent: Henchen, Robert Caucasian/Male/42 Years

Case Number: 1023-07

Pathologist: Sung-ook Baik, M.D.

County: Erie

Specimens Submitted

<u>Collected or Submitted by/ Specimen Type</u>	<u>Sample Control #</u>	<u>Container Type</u>	<u>Collection site</u>	<u>Approximate amount</u>	<u>Date/Time collected</u>	<u>Date rec'd in lab</u>
<u>Erie County Medical Center</u>						
Blood - Premortem	07052310325594090	Tube, lavender top		3 ml	5/15/07 12:20	5/22/07
Serum	07052310331790472	Tube, serum separator		3 ml		
Serum	07052310334748342	Tube, serum separator		3 ml	5/15/07 18:13	
Urine - Premortem	07052310343577438			18 ml	5/15/07 15:40	

Results of Toxicological ExaminationQualitative Test Results

<u>Test Run Specimen</u>	<u>Test Method Sample Control #</u>	<u>Analytes Detected by Method</u>	<u>Results</u>
<u>Chem Color Tests</u>			
Blood - Premortem	07052310325594090	Salicylates	Negative
<u>Drug Screen SPE</u>			
Blood - Premortem	07052310325594090		Negative
Urine - Premortem	07052310343577438	Haloperidol	Positive
<u>ELISA</u>			
Blood - Premortem	07052310325594090	Benzodiazepines	Negative
		Cannabinoids	Negative
		Fentanyl	Negative
		Oxycodone	Negative
		Sympathomimetics	Negative
<u>ELISA Limited</u>			
Blood - Premortem	07052310325594090	Cocaine Metabolite	Negative
		Opiates	Negative

Quantitative Test Results

<u>Test Run</u>	<u>Test method</u>	<u>Specimen</u>	<u>Sample Control #</u>	<u>Result</u>
<u>Analyte found</u>				
<u>BDQ (LC/MS) Method I</u>				
Haloperidol	LC-DAD/MS	Blood - Premortem	07052310325594090	Insufficient sample
<u>Volatiles</u>				
Acetone	Headspace-GC/FID	Serum	07052310331790472	0.01 % (w/v)
		Urine - Premortem	07052310343577438	0.01 % (w/v)

**EXHIBIT 2**

At a Surrogate's Court of the State  
of New York, held in and for the  
County of Erie, at Buffalo, NY  
on May 27, 2009.

PRESENT: HON. BARBARA HOWE  
Surrogate

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File No. 2007-2920 /4

In the Matter of the Application of  
DARLENE HENCHEN, as Administrator of  
The Goods, Chattels and Credits which were  
Of ROBERT HENCHEN,  
Deceased

DECREE

For leave to compromise and settle a certain  
Cause of Action for the pain and suffering  
of Decedent and to render an account of the  
proceedings as such Administrator

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RECEIVED  
MAY 27 2009  
SURROGATE'S OFFICE  
ERIE COUNTY, N.Y.

Upon reading and filing the Petition of DARLENE HENCHEN as  
Administrator of the Estate of ROBERT HENCHEN, deceased, duly <sup>signed</sup> verified on  
February 2, 2009, asking for a Decree of the Court permitting the said  
DARLENE HENCHEN, as Administrator, to compromise and settle for the sum  
of \$49,995.00, the Cause of Action against Defendants, Erie County, the Erie  
County Holding Center and several employees of the Holding Center for the  
pain and suffering of the decedent, ROBERT HENCHEN;

AND, that the entire recovery of said action should be allocated to the Cause of Action for decedent's pain and suffering;

AND, to modify the Letters of Administration to permit said compromise;

AND, to dispense with the filing of a bond;

AND, that John J. Molloy, Esq., will be compensated for legal services rendered;

AND, the Surrogate having issued a Citation to all persons interested in the estate of the deceased to attend such judicial settlement on May 20, 2009 at 9:30 a.m. at the Surrogate's Court, Erie County;

AND, the said Citation having been duly returned with proof of service thereof, or the due appearance and waiver of notice, by the following named persons, to wit: CAREN STANDISH, COLLEEN PILON, LORI FERRIS, MATHEW HENCHEN, RONALD HENCHEN, RANDALL HENCHEN, DANIEL HENCHEN, CATHERINE USSELMAN, SUSAN PESCARA, JULIA HENCHEN and NYS DEPT. OF TAXATION AND FINANCE;

AND, the said DARLENE HENCHEN, as Administrator, petitioner herein, having appeared by John J. Molloy, Esq., her attorney.

AND, due deliberations having been had thereon; now it is hereby

ORDERED, ADJUDGED AND DECREED that the petitioner's application for leave to compromise and settle the Cause of Action for pain and suffering, *and wrongful death, and* to allocate the entire amount of the proceeds to the Cause of Action for pain and suffering; and, to grant leave to discontinue the Cause of Action, is granted and it is further

ORDERED, ADJUDGED AND DECREED, that the petitioner, as Administrator of the decedent's estate is authorized to sign and all documents needed to effectuate the distribution and it is further

ORDERED, ADJUDGED AND DECREED, that the entire settlement sum of \$49,995.00 be allocated to the Cause of Action for pain and suffering; that the *wrongful death and* personal injury action be discontinued with prejudice and without interest, costs or disbursement; and it is further

ORDERED, ADJUDGED AND DECREED, that the entire settlement sum of \$49,995.00 be paid by the Defendants as follows:

John J. Molloy	legal fee	\$ 16,405.00
John J. Molloy	disbursements	\$ 777.18
<i>The Estate of Robert</i> <del>Darlene</del> Henchen		<u>\$ 32,812.82</u>
		\$ 49,995.00

ORDERED, ADJUDGED AND DECREED, that the giving of a bond or other security in connection therewith be dispensed with; and that the restrictions on the Letters of Administration be modified to allow the above settlement.

DATED: May 27, 2009

BARBARA HOWE

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SURROGATE